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Supreme Court of the United States.

OCTOBER TERM, 1932

IN EQUITY NO. 326.

J. H. STEPHENSON, ET AL.,
Appellants,

vs.

T. BINFORD, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF D. A. BEARD, INTERVENER.

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INDEX.

	PAGE
Jurisdiction	1
Statement of Case	2
(a) The business of this intervener	2
(b) The statute complained of	3
The Contentions of this Intervener	4
Argument	5
The provisions of the Texas statute requiring this intervener to procure a permit from the Commission, fixing his minimum rates, and requiring him to furnish cargo insurance are regulations of his business which deprive him of his property without due process of law in violation of the Fourteenth Amendment	5
A. This intervener is a private carrier	5
B. These provisions are regulations of the business of this intervener and are not regulations with a view to conservation of the highways	6
C. The business of private carriage of this intervener cannot, in view of the Fourteenth Amendment, be subjected to such regulations	14
1. This is manifest from controlling decisions of this Court	14
2. The attempt of the appellees to distinguish these decisions is unsound	18
3. The business of this intervener is not "affected with a public interest"	22
4. The regulations imposed upon the business of this intervener cannot be sustained as conditions precedent to the privilege of using the highways	35
Conclusion	38

TABLE OF AUTHORITIES.

CASES CITED.

PAGE

Adkins v. Children's Hospital, 261 U. S. 525.....12, 25, 34
Barney v. Board of R. R. Commrs., U. S. Daily, July 7, 1932, p. 854.....10, 20
Barrett v. New York, 232 U. S. 14..... 13
Block v. Hirsh, 256 U. S. 135.....12, 24
Budd v. New York, 143 U. S. 517..... 24
Buck v. Kuykendall, 267 U. S. 307.....9, 19
Cobb v. Department of Public Works, 60 F. (2d) 63.... 13
Continental Baking Co. v. Woodring, 286 U. S. 352.....6, 18
Continental Baking Co. v. Woodring, 55 F. (2d) 347.... 13
Co-ordination of Motor Transportation, 182 I. C. C. 263 32
Fairmont Creamery Co. v. Minnesota, 274 U. S. 1.....12, 34
Frost v. Railroad Comm., 271 U. S. 583 5, 14, 15, 28, 31, 32, 35, 37
German Alliance Ins. Co. v. Lewis, 233 U. S. 389.....12, 24
Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335 6
Ingate v. Christie, 3 Car. & K. 61..... 5
Louis v. Boynton, 53 F. (2d) 471..... 13
Michigan Public Utilities Comm. v. Duke, 266 U. S. 570 5, 14, 24, 28
Munn v. Illinois, 94 U. S. 113..... 24
New State Ice Co. v. Liebmann, 285 U. S. 262 4, 10, 25, 28, 32, 34
Producers' Transportation Co. v. Railroad Comm., 251 U. S. 228.....12, 24
Red Ball Transit Co. v. Marshall, 8 F. (2d) 635..... 13
Ribnik v. McBride, 277 U. S. 350.....12, 23

PAGE

Sage v. Baldwin, 55 F. (2d) 958 7
Smith v. Cahoon, 283 U. S. 553 ..... 4, 5, 6, 14, 16, 28
Sproles v. Binford, 286 U. S. 374 ..... 6, 18
Sprout v. South Bend, 277 U. S. 163 13
Stafford v. Wallace, 258 U. S. 495 24
Tagg Bros. & Moorhead v. United States, 280 U. S. 420. 24
Terminal Cab Co. v. Kutz, 241 U. S. 252 5
Texoma Natural Gas Co. v. Railroad Comm., 59 F. (2d) 750 24
Tyson v. Banton, 273 U. S. 418 ..... 12, 23, 28, 34
Weaver v. Public Service Comm., 40 Wyo. 462, 278 Pac. 542 36
Williams v. Standard Oil Co., 278 U. S. 235 ..... 12, 23, 32, 34, 37
Wilson v. New, 243 U. S. 332 ..... 24, 34
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 ..... 24, 28, 34, 35, 37

STATUTES.

Statute of California, 1917, p. 330 15
Florida Laws, 1929, c. 13, 700 16
Michigan Public Acts, 1923, No. 209 14
Montana Laws, 1931, c. 184 20
Oklahoma Laws, 1925, c. 147 26
Texas General Laws (Forty-Second Legislature, Regular Session, 1931), c. 277 ..... 1, 3
28 U. S. C. Section 380 1

PERIODICALS.

Brown and Scott, *Regulation of the Contract Motor Carrier under the Constitution,* 44 Harv. L. Rev. 530. 11

PAGE

Kelly, *The Problem of Motor Vehicle Regulation*..... 25

Robinson, *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277..... 24

BRIEFS.

Brief for Appellant in Michigan Public Utilities Comm. v. Duke 22

Brief for Appellant in Smith v. Cahoon..... 22

Supreme Court of the United States.

OCTOBER TERM, 1932.

J. H. STEPHENSON, ET AL., APPELLANTS
vs.
T. BINFORD, ET AL., APPELLEES.
} In Equity No. 326.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF D. A. BEARD, INTERVENER.

JURISDICTION.

This suit in equity to enjoin and restrain the enforcement of Texas General Laws (Forty-Second Legislature, Regular Session, 1931) c. 277 upon the ground that certain provisions thereof contravene the Fourteenth Amendment to the Federal Constitution was brought in the District Court of the United States for the Southern District of Texas.

The bill of complaint was filed on August 20, 1931. (R. 2.) This intervener, D. A. Beard, filed his intervention on August 25, 1931. (R. 47.) After hearing before a statutory court, organized pursuant to 28 U.S.C. Section 380, the temporary injunction prayed for in the bill was denied, October 26, 1931. The opinion of the Court is reported in 53 F. (2d) 509. (R. 129.)

A final hearing of this cause was then had and a final decree denying a permanent injunction was rendered on June 8, 1932. (R. 180-81.) The opinion of the Court, as yet not reported, is found on page 180 of the Record.

By an order filed July 6, 1932, an appeal to this Court was allowed. (R. 194.) The cause was advanced by this Court and set for argument on November 14, 1932.

STATEMENT OF CASE.

(A) THE BUSINESS OF THIS INTERVENER.

This intervener, D. A. Beard, is engaged under an oral agreement entered into April 15, 1931 with the Peden Company, a wholesale jobber and distributor of hardware, to transport its commodities from its principal place of business in Houston to its warehouses in San Antonio, Beaumont, Abilene, and elsewhere in Texas. (R. 172, 198.) The intervener's compensation is determined by agreement with the Peden Company before or after each particular trip or haul. (R. 198, 199.) The intervener does not operate upon a regular route, nor does he make regular trips. He hauls when and where the company directs. (R. 199.) He handles only about one-third of the transportation for the Peden Company; the remainder goes by rail. (R. 198.)

This intervener does not solicit the freight of others than the Peden Company or otherwise hold himself out to carry for the public at large. (R. 200.)

He does not carry cargo or merchandise insurance, not being called upon to do so by his agreement with the Peden Company. (R. 200.)

The rates agreed upon between this intervener and the Peden Company are lower than those charged by competing

common carriers for substantially the same service. (R. 198-199, 201-03.)

This intervener has invested approximately eighteen thousand dollars in his equipment, the principal part of which will be lost if he is not permitted to transport for the Peden Company under the existing agreement. (R. 199-200.)

(B) THE STATUTE COMPLAINED OF.

The statute in question, Texas General Laws (Forty-Second Legislature, Regular Session, 1931) c. 277 is printed *in extenso* in the Record, pages 9 to 32. It provides for the regulation of carriers of freight for hire upon the highways, imposing regulations upon the businesses of both common and contract carriers. Contract or private carriers are required by Section 6 to obtain permits before engaging in business. Permits are to be granted or refused by the Commission upon considerations relating to the effect of additional competition upon existing common carriers. These considerations are more fully set forth and dealt with hereinafter. This is likewise true of the provisions of Section 6aa, providing that the minimum rates of private carriers operating in competition with common carriers shall be fixed by the Commission, but shall not be less than those prescribed for such common carriers. Section 13 requires that, as a condition precedent to operation on the highways, both common and private carriers must furnish insurance or bonds conditioned upon loss or damage to goods carried by such carriers while in transit.

The court below has held that these provisions of this statute are constitutional as applied to this intervener.

THE CONTENTIONS OF THIS INTERVENER.

This intervener does not propose here to argue all the propositions set forth in the appellants' Statement of Points. (R. 289-92.) In dealing only with certain of these points, this intervener does not intend to suggest any doubt as to the soundness of the points which are not referred to herein but are argued by other counsel in whose contentions this intervener joins.

This intervener is only concerned with those provisions of the statute which attempt to regulate his business relations with the Peden Company. He makes no contentions with regard to the portions of the statute which may fairly be considered as reasonable safeguards of the highways and their use.

More specifically, this intervener contends that the provisions of Sections 6 and 6aa, and those of Section 13, so far as cargo insurance is required of him by that section, are unconstitutional as applied to his business. In this he relies primarily upon the decisions of this court in *Smith* v. *Cahoon*, 283 U. S. 553, and *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, and upon the authorities upon which those recent decisions are predicated.

ARGUMENT.

THE PROVISIONS OF THE TEXAS STATUTE REQUIRING THIS INTERVENER TO PROCURE A PERMIT FROM THE COMMISSION, FIXING HIS MINIMUM RATES, AND REQUIRING HIM TO FURNISH CARGO INSURANCE ARE REGULATIONS OF HIS BUSINESS WHICH DEPRIVE HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. This Intervener is a Private Carrier.

He is engaged under a single oral contract to transport by motor truck commodities of the Peden Company, when and where the Peden Company directs. His compensation is determined by agreement in each particular instance, either before or after his services are rendered. He carries for no other person or corporation, but solely for the Peden Company to which he devotes his entire equipment. He solicits no other business. In short, this intervener does not hold himself out to carry the goods of all, but confines his operations to the fulfillment of his contract with the Peden Company.

As far back as *Ingate* v. *Christie,* 3 Car. & K. 61 (1850) it was said:

> "The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract."

Judged by this test, and by the decisions of this court in *Michigan Public Utilities Comm.* v. *Duke,* 266 U. S. 570, *Frost* v. *Railroad Comm.,* 271 U. S. 583, *Terminal Cab Co.* v. *Kutz,* 241 U. S. 252, and *Smith* v. *Cahoon,* 283 U. S. 553, it seems beyond dispute that this intervener, engaged exclusively in

transporting under a single contract, occupies the status of a purely private carrier.

The sole issue of his appeal is whether his business as such may be subjected to the regulations which the Texas statute imposes.

B. These Provisions are Regulations of the Business of this Intervener and are not Regulations with a View to Conservation of the Highways.

We are not here concerned with the power of the state to regulate traffic on the highways in the interest of preserving their condition and the safety of the traveling public. The power of the state to impose reasonable regulations upon the use of the highways is not questioned. *Cf. Sproles* v. *Binford,* 286 U. S. 374. This intervener does not complain of the provisions of the statute attributable solely to this power, as, for example, Section 6 cc which restricts the hours of operation by truck drivers, and Section 13, so far as it requires the giving of bond to secure the public against loss from personal injuries. Provisions having this power as their source, it is agreed, may appropriately be applied to both common and contract carriers. See *Smith* v. *Cahoon,* 283 U. S. 553, 563; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 368-69; *Hodge Drive-It-Yourself Co.* v. *Cincinnati,* 284 U. S. 335, 337.

But the Texas statute is primarily designed to regulate and restrict the businesses of common and private carriage. By this enactment the state asserts power to impose competitive restrictions upon the intervener in conducting his business as a private carrier. As the court below points out, these restrictions are not imposed "upon the pretext of regulating highways." (53 F. (2d) at 513, R. 134). They are sought to be supported by the asserted power for economic reasons to regulate the business of intervener's private undertaking. They constitute burdens and impose

duties peculiar to public utilities generally. Of them the intervener complains.

A classification of the provisions of this statute according to their source in one or the other of these powers is contained in *Sage* v. *Baldwin,* 55 F. (2d) 968. It was there held that the provisions of this statute regulating the business of private carriage could not constitutionally be applied to contract carriers engaged in interstate commerce.

This case was decided by a statutory court for the Northern District of Texas, Dallas Division. Circuit Judge Hutcheson, who wrote the opinion in the instant case, was a member of the court and concurred in the decision. The last paragraph of the opinion reads (55 F. (2d) at 971):

> "Preserving, therefore, the rights of the state and the rights of the nation, the respondents will be enjoined from interfering with the operations of the complainants, or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, or so far as any certificate of public convenience or necessity is concerned, or so far as the impairment of any other service, either contract or common carrier is concerned, or so far as the making of any reports or the keeping of classification of accounts, or in any wise seeking to effect the relationship of the complainant, or any of them, to shippers, either within or without the state; the order making it clear that nothing in this restraint shall in any manner limit the power of respondents in the exercise of the police power of the state relating to traffic safety; highway protection; competent drivers, who shall be licensed; the hours of drivers; the giving of bond to secure the public against loss from personal injuries; the inspection and approval or disapproval of the equipment; the display of the license tag; the equipment itself; classification of the highways of the state as to congestion; and their character and ability to withstand use—all as provided for as traffic safety provisions in the act."

The specific provisions of the statute which the intervener contends cannot constitutionally be applied to him because they are regulations of his private business are:

(1) The permit requirements of Section 6.

By this section it is provided that no contract carrier shall operate "until it shall have received a permit from the Commission to engage in such business." (Section 6 (a)) It is further provided that no permit shall be granted "if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory." (Section 6 (c)) No such permit shall be issued "until the applicant shall have in all things complied with the requirements" of the statute. (Section 6 (a))

It is perhaps relevant, in view of argument predicated upon the fact that the statute deals with common and contract carriers separately, briefly to compare the permit requirements with the provisions for certification of common carriers. By section 9 it is provided that a certificate of public convenience and necessity shall not be issued to a common carrier if the Commission determines "that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways designated, or that such highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes. . . ."

It will be noted:

First, that the primary test in both sections is that of the adequacy or inadequacy of existing facilities;

Second, that, if other facilities are adequate, a certificate must be denied, while a permit may be granted only if, in the opinion of the Commission, the "proposed service" will not impair the "efficient public service" of certificated common carriers. There is no practical difference. Any proposed private carrier service, such as a contractual arrangement between even one substantial shipper and a private carrier, will tend to impair the service of the existing common carrier or carriers and thus tend to impair their efficiency. It is true that if the proposed contract is to supercede one between the shipper and another private carrier, the efficiency of authorized common carriers will not be impaired in the slightest. This provision, therefore, protects the common carrier from competition from private carriers, but does not afford the private carrier protection from like competition. The common carrier thus becomes the sole beneficiary of the permit requirements, which combine all the restrictions upon the business of private carriage which attach to certification without the compensating advantages of limiting competition;

Third, that while the Commission is to consider highway and traffic conditions before granting certificates to common carriers, no such considerations are prescribed relative to the issuance of permits to private carriers. In the latter case, only *competitive* conditions are to be considered.

It is evident upon analysis that the permit requirement of section 6 is not designed as a highway protective measure or highway traffic regulation. It was not enacted, as the lower Court pointed out, "upon the pretext of highway regulation." (53 F. (2d) at 513; R. 134.) What was said of certification of common carriers in *Buck* v. *Kuykendall,* 267 U. S. 307, is equally applicable here (pp. 315-16):

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the pro-

> hibition of competition. It determines not the manner of use, but the persons by whom the highway may be used."

However they may be described, the provisions of Section 6 are solely directed towards restriction of the business of the private carrier. They are such restrictions as may constitutionally be imposed upon public carriers or public utilities but upon no others. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262; *Barney* v. *Board of R. R. Commrs.,* (decided June 25, 1932, Sup. Ct. Montana, see U. S. Daily, July 7, 1932, p. 854, not yet reported).

(2) Rate regulation provided for in Section 6aa.

This section reads as follows:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers *in competition with common carriers* over the highways of this State and the Commission *shall* prescribe *minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.*" [1]

Two points should here be noted. First, the Commission is vested with authority to regulate the rates of contract carriers only when such carriers are operating in competition with common carriers. Precisely what constitutes "competition" within the contemplation of this section is not altogether clear. Presumably, however, this intervener is operating in "competition" with every common carrier, whether by truck or by rail, whose facilities are reasonably adapted to carry the commodities of the Peden Company which are now being carried by the intervener under private

[1] The italics are ours unless the contrary is indicated.

contract. Here, as in the permit requirements of Section 6, the single aim is the restriction of competition between common and private carriers, not that between private carriers.

Second, it is mandatory upon the Commission to prescribe minimum rates which shall be at least equal to those prescribed for competing common carriers. Thus the rates of private carriers are to be fixed, not on any basis of the cost of the service rendered or of the fair value of the service to the shipper nor with regard to a fair return to the private carrier upon his investment, but solely with reference to the rates of his competitors. The Commission is not, however, authorized to fix maximum or exact rates although it has that power over the rates of common carriers. (Section 4 (a))

Judged by its necessary effect, the preconceived aim of the permit requirement of Section 6 is that no private carrier shall contract with any shipper to whom "adequate" common carrier facilities are available. When to this is added this highly artificial rate fixing provision by which certificated common carriers are placed in a peculiarly advantageous competitive position as against such private carriers as may be able to procure permits, the outcome can only be that the private carrier will ultimately be regulated out of existence. His rates are to be fixed by the necessarily general consideration which determines the charges of those who serve all who come. He may no longer save to himself and his customer the economies permitted by the specific situation. He must meet competition from powerful units deprived of his own weapons of competition.

No extended argument is required to demonstrate that the regulation of rates is purely a regulation of business, finding no semblance of authority in the power to legislate for the preservation of the highways or safety in their use. See Brown & Scott, *Regulation of the Contract Motor Carrier Under the Constitution,* 44 Harv. L. Rev. 530, 550-58.

It is, of course, clear that governmental rate regulation is an interference with the freedom of contract, which may be imposed upon common carriers or upon businesses which due to peculiar circumstances of devotion to public use, virtual monopoly or inequality of bargaining power between producer and consumer are affected by the public interest and have thus acquired the status of a public utility.

Williams v. *Standard Oil Co.*, 278 U. S. 235.
Ribnik v. *McBride*, 277 U. S. 350.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1.
Tyson v. *Banton*, 273 U. S. 418.
Adkins v. *Children's Hospital*, 261 U. S. 525.
Block v. *Hirsh*, 256 U. S. 135.
Producers' Transportation Co. v. *Railroad Comm.*, 251 U. S. 228, 230, 231.
German Alliance Insurance Co. v. *Lewis*, 233 U. S. 389.

The question therefore comes down to whether the business of the intervener, shown above to be a private business under familiar definition, can by legislative fiat be transformed into a public business and as such made subject to regulation of this character.

(3) The cargo insurance requirements of Section 13.

In this section common and private carriers are treated indiscriminately. So far as it requires bonds or insurance to secure the public against loss from personal injuries, no question is raised. But to the extent that this section requires so-called "cargo" insurance to secure the shipper from loss of or damage to his property in transit, it imposes a requirement which bears no relation to public safety or order in the use of motor vehicles upon the highways, but attempts to invade the field of matters which are properly

incident to the private contractual relationship between shipper and private carrier. It prevents the shipper from saving himself the cost of such insurance if he prefers himself to take the risk or to rely upon the financial responsibility to the carrier. It is clearly an unwarranted regulation of the private business both of the intervener and of his customer.

Louis v. *Boynton*, 53 F. (2d) 471.
Continental Baking Co. v. *Woodring*, 55 F. (2d) 347, affirmed 286 U. S. 352.
Sprout v. *South Bend*, 277 U. S. 163.
Barrett v. *New York*, 232 U. S. 14.
Red Ball Transit Co. v. *Marshall*, 8 F. (2d) 635, appeal dismissed without opinion 273 U. S. 782.
Cobb v. *Department of Public Works*, 60 F. (2d) 631.

It has occasionally been held, in inferior courts, that similar insurance requirements are to be construed, for constitutional reasons, not to require cargo insurance of contract carriers.

Louis v. *Boynton*, 53 F. (2d) 471, 473.
Continental Baking Co. v. *Woodring*, 55 F. (2d) 347, 357.

Whatever may have been the justification for the interpretation in other instances, it is submitted that such is not an admissible construction of the present section. It is provided that "before any permit or certificate of public convenience and necessity may be issued to any motor carrier" such motor carrier shall file bonds and insurance policies which "shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the

motor carriers so filing said insurance policies and bonds, based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds and policies arising out of the actual operation of such motor carriers. . . ." It is manifest that no distinction is made between common and contract carriers, and that the scope of this provision includes the requirement of cargo insurance of both common and private carriers. Any doubt which may exist is dispelled by the proviso "that the Commission shall not require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by any motor carrier."

C. The Business of Private Carriage of this Intervener cannot, in view of the Fourteenth Amendment, be subjected to such regulations.

1. This is manifest from controlling decisions of this Court.

This intervener contends that the foregoing restrictions can not be imposed upon his business consistently with the due process clause of the Fourteenth Amendment. This, it is submitted, has been consistently held by this Court in the controlling decisions of *Michigan Public Utilities Comm.* v. *Duke,* 266 U. S. 570, *Frost* v. *Railroad Comm.,* 271 U. S. 583, and particularly *Smith* v. *Cahoon,* 283 U. S. 553.

In the *Duke* case, all carriers for hire, including private carriers, were declared to be common carriers and required to procure permits issued upon considerations very similar to those provided in Section 6 of the Texas statute. The Michigan statute there in controversy (Michigan Public Acts, 1923 No. 209) also provided for rate regulation and cargo insurance. It was held that the Michigan statute, as applied to a private carrier engaged in interstate commerce, not only constituted an unlawful interference with

interstate commerce, but also was violative of the Fourteenth Amendment. Mr. Justice Butler there said (266 U. S. at 577-78):

> "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment."

Frost v. *Railroad Comm.*, 271 U. S. 583, represented an extension of the fundamental principle announced in the *Duke* case. The California statute in question (Statutes of California, 1917, p. 330) required certificates of convenience and necessity of both common and contract carriers and the regulation of the rates of both. While there was no express declaration that contract carriers were henceforth to be deemed common carriers, the California Supreme Court, in construing the statute, held that this was its effect, and attempted to justify its decision upon the theory that the private carriers used the highways as a privilege which might be conditioned upon the consent by private carriers to be regulated under the provisions of the California statute. This court held that the requirement of a certificate of convenience and necessity was a regulation of the business of private carriage and that the plaintiff could not validly be subjected to this and the other duties and burdens imposed by the Act upon common carriers either directly or as a condition to the granting of the privilege of using the highways, if in fact such use was by virtue of a privilege. It is important in view of the contention that the Texas statute may be upheld because it is a regulation of competition afforded by private carriers to common carriers, which in fact is its purpose and will be its result, to note the lan-

guage by which the California statute, declared invalid in the *Frost* case, was characterized by this Court (271 U. S. at 591-92):

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. *Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.* Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed."

Smith v. *Cahoon*, 283 U. S. 553, arose upon facts substantially similar to those in the *Frost* case. The Florida statute there involved (Florida Laws, 1929, c. 13,700) required certificates of both common and private carriers, provided for the regulation of their rates and called for cargo insurance for both types of carriers. Unlike the *Frost* case, however, the Supreme Court of Florida specifically held that "the statute does not require private carriers to become common carriers." (283 U. S. at 560) While the case arose upon appeal from denial of a writ of habeas corpus sought in behalf of a purely private carrier who was arrested upon the charge of having operated without first having obtained a certificate of public convenience and necessity and without having paid the tax required by the Florida statute, this Court in its opinion did not confine itself strictly to the question as to whether a certificate or payment of the tax might be required of the appellant private carrier but dealt with the statute as a whole. This Court condemned the statute in the following language (283 U. S. at 562-63):

> "The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory

definition, and this admittedly included the appellant. It not only required an application for a certificate of public convenience and necessity but that this should be accompanied by a schedule of tariffs, and no such certificate was to be valid without the giving of a bond by the applicant for the protection both of the public against injuries and of the persons or property carried. The state commission was explicitly vested with authority to supervise "every" auto transportation company that was embraced within the definition, to fix or approve its rates and charges, to regulate its service, to prescribe its method of keeping accounts which should set up adequate depreciation charges, and generally to make rules governing its operations. Schedules of rates of "every such auto transportation company" were to be open to the public and all alterations in tariffs were to be subject to the commission's control. On the face of the statute, the scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service. *No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers.* All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state. See Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 576-578, Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 592."

The italicized sentence brings out in bold relief the distinction which has already been expressed in the *Frost* case.

(271 U. S. 583, 591.) The business of a purely private carrier is a private undertaking, and as such is not subject to regulation or interference by restrictions as to who may enter the business and how much shall be charged. These, and the requirement of cargo insurance, are to be left solely to private contract between shipper and the carrier.

On the other hand, regulations such as those relating to safety, weight, speed, equipment and hours of labor, which may fairly be said to be designed primarily for the promotion of safety upon the highways and the preservation of the highways may appropriately be applied to both common and contract carriers.

This distinction between permissible and prohibited regulation was reiterated by this court in *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, where the Court said (pp. 368-69):

> "The distinction made by the statute between public and private carriers with respect to the obtaining of certificates of public convenience and necessity, and as to rates and charges, indicates the intention to keep separate the special responsibilities of public carriers from the more limited but still important duties which are owing as well by private carriers, in protecting the public highways from misuse and in insuring safe traffic conditions, and there is no reason to conclude that the authority given to the commission will not be viewed and exercised accordingly."
>
> See also *Sproles* v. *Binford,* 286 U. S. 374, 394.

2. The attempt of the appellees to distinguish these decisions is unsound.

The appellees seek to distinguish the present case from *Smith* v. *Cahoon* by the fact that in the *Cahoon* case both common and contract carriers were dealt with under the single all-inclusive Florida statute without separation of the requirements applicable to common carriers from those im-

posed upon private carriers. In the Texas statute, it is said, contract carriers are dealt with separately and are subjected to "a separate scheme of regulation"; for this reason it is contended that the decision in the *Cahoon* case is not applicable. The mere fact of the physical separation of the provisions regulating the one and the other type of carriers is obviously without relevance. If the legislature of Texas had passed two statutes, one dealing with regulation of common carriers and one with that of contract carriers, identical save for the use of the terms "common carrier" in the one and "contract carrier" in the other, it could hardly be contended that the force of the *Cahoon* case and its predecessors would thus be avoided. Manifestly the fact that contract carriers were included within the term "common carrier" in the *Duke* case and within the all-inclusive terms "transportation company" in the *Frost* case and "auto transportation company" in the *Cahoon* case is not determinative. It is immaterial what terms the legislature uses; the determining factor is the nature of the regulations and restrictions which the statute places upon private carriers, by whatever name they are called.

As this Court has clearly pointed out in the *Cahoon* case, if the separate scheme of regulation as applied to private carriers deals primarily with the manner of the use of the highways and with questions of safety and operation thereupon, it is within the power of the state. But if, as was stated in *Buck* v. *Kuykendall*, 267 U. S. 307, 316, "its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition," and if it results in interference with the conduct by this intervener of his business as a private carrier and the fulfillment of his contract with the Peden Company, it is beyond the power of the state since it deprives the intervener of his property without due process of law in contravention of the Fourteenth Amendment.

This conclusion from the settled decisions of this Court has recently been drawn by the Montana Supreme Court in *Barney* v. *Board of Railroad Commissioners,* decided June 25, 1932, U. S. Daily, July 7, 1932, 854, (not yet officially reported). The Montana law there in controversy (Montana Laws, 1931, c. 184) provided for separate classifications, Classes A and B being common carriers and Class C including only contract carriers. The rates of Classes A and B, but not those of Class C, were subjected to regulation by the Board. The Board also was given broad powers to make rules and regulations with regard to schedules and services, but it was specifically provided that in making such rules or regulations the Board "shall have due regard for the differences existing between Class A, Class B and Class C motor carriers as herein defined." All three classes of carriers were required, but in separate sections of the statute, to procure certificates of public convenience and necessity. The considerations prescribed for the Board in granting certificates were identical in each section. The Board was directed to give "reasonable consideration to the transportation service being furnished or that will be furnished by any railroad, or other existing transportation agency, and shall give due consideration to the likelihood of the proposed service being permanent and to continue through twelve (12) months of the year and the effect which such proposed transportation service may have upon other forms of transportation service which are essential and indispensible to the community and would be affected by such proposed transportation service or that might be affected thereby." The plaintiff, a private carrier, applied for a certificate which was denied on the ground that public convenience and necessity did not require the service he proposed. The plaintiff then brought suit to restrain the enforcement of the act as against him. The defendants filed a general demurrer which was overruled. Upon appeal, it was

held that the certificate requirement constituted a regulation of the business of the plaintiff and was therefore invalid by virtue of the numerous decisions of this Court. The Court said,

> "The requirement that a private carrier must obtain a certificate of public convenience and necessity before being permitted to use the public highways of the State, not being a regulation of the use of highways but a prohibition of competition and, therefore, a measure designed to regulate the business of those using the highways, can not stand."

Upon this analysis, it is manifest that the provisions of the Texas statute of which this intervener complains are not validated because they are contained in separate sections of the statute or because the precise manner of the regulation under these sections differs somewhat from that applied to common carriage. The essential fact is that they are attempts to regulate the business of private carriage and to interfere with this intervener in his performance of his purely private undertaking. For these reasons, arguments predicated upon the separate treatment of common and of private carriers in this Texas statute can not prevail.

The Court's attention is particularly called to the dissenting opinion of District Judge Kennerly, in which he said (53 F. (2d) at 516; R. 142):

> "In what is said respecting those regulations contained in the Legislative Act (House Bill 335), which concern traffic safety and highway protection, I fully concur. McLeaish v. Binford (D.C.) 52 F. (2d) 737; Sproles v. Binford (D.C.) 52 F. (2d) 730; and McLeaish v. Binford (D.C.) 52 F. (2d) 151, and cases there cited.
>
> I cannot, however, see my way clear to concur in the disposition made of the questions raised and presented by complainant and interveners (who are I think clearly contract carriers or private carriers, and not common carriers) respecting those regulations in the act which in

> no real sense concern traffic safety and highway protection, but are in fact a regulation of the business, and a restriction of the right of contract, of the contract carriers. I think there is no material difference in legal effect between the Michigan, Washington, California, and Florida Acts and this act, and that Michigan v. Duke, 266 U.S. 571, 45 S. Ct. 191, 69 L. Ed. 445, 36 A.L.R. 1105; Buck v. Kuykendall, 267 U.S. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A.L.R. 286; Frost v. Commission, 271 U.S. 583, 46 S. St. 605, 70 L. Ed. 1101, 47 A.L.R. 457; and Smith v. Cahoon, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264, are controlling. I think the temporary injunction prayed for, restraining the enforcement of the last-mentioned regulations, should be granted."

It is submitted that in view of the settled decisions of this Court the decision of the majority of the Court below is in error, and that the view of District Judge Kennerly in his dissenting opinion is correct.

3. The business of this intervener is not "affected with a public interest."

It has been pointed out that the permit requirements and rate-fixing provision of the Texas statute are business regulations such as may only be imposed upon public utilities or quasi-public businesses. It has also been demonstrated that the Court has from the *Duke* and *Cahoon* cases consistently held that such regulations may not be imposed upon purely private carriers such as this intervener. Since it is only upon the ground that the business of private carriage is one "affected with a public interest" that such regulations could have been sustained, the issue of the public status of private carriage was in those cases before this Court. In *Michigan Public Utilities Comm.* v. *Duke* and in *Smith* v. *Cahoon,* this issue was specifically briefed and argued before this Court. See Brief for Appellant in *Michigan Public Utilities Comm.* v. *Duke,* pp. 21-25, and Brief for Appellant in *Smith* v.

Cahoon, pp. 28-32. The necessary conclusion from these decisions is that the business of private carriage is not one "affected with a public interest."

Nevertheless the appellees ask this court to declare that the business of private carriage is so clothed. Their contention, if acceded to, would result not only in disregard of what the Court has determined but in a departure from the guiding principles by which this Court has pricked out the line between those businesses which, consistently with the due process clause, may be subjected to regulation, and those which may not. The peculiar economic conditions which have been found to prevail in the businesses determined by this Court to be "affected with a public interest," and which have justified interference with the continuance of those businesses under the normal conditions of free contract are totally absent from the business of private carriage engaged in by this intervener.

One test of public character is that of devotion to a public use, which was applied by this court in *Tyson* v. *Banton,* 273 U. S. 418, *Ribnik* v. *McBride,* 277 U. S. 350 and *Williams* v. *Standard Oil Co.,* 278 U. S. 235. In the first case Mr. Justice Sutherland for the majority said (273 U. S. at 433-34):

> "The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, . . . that it shall be devoted to 'a public use'. Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."[1]

It is clear from the facts appearing in the record relative to the business of this intervener that he does not answer to this test. He is a purely private carrier devoting all his

[1] *Italics those of Mr. Justice Sutherland.*

facilities under a single contract to a single corporation; he carries for no one else. He falls squarely within the language of Mr. Justice Butler in *Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. 570, 576:

> "The plaintiff is a private carrier. . . . He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others."

See also *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.
Producers' Transportation Co. v. *Railroad Comm.*, 251 U. S. 228.
Texoma Natural Gas Co. v. *Railroad Comm.*, 59 F. (2d) 750.
Robinson, *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277, 293-303.

The familiar criterion of virtual monopoly is also inapplicable. The private carrier in Texas enjoys no peculiarly advantageous location which permits him monopolistic dictation of rates or service to the public detriment. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Stafford* v. *Wallace*, 253 U. S. 495. Rate competition has not been eliminated by agreement of private carriers among themselves; no concerted action exists among them which obstructs the function of competitive forces and renders it "illusory to speak of a liberty of contract." *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. No major temporary emergency has lodged in this intervener and other private carriers the economic power to exact extortionate charges. *Block* v. *Hirsh*, 256 U. S. 135; *Wilson* v. *New*, 243 U. S. 332.

It is not contended by the appellees that any of those conditions exist; the record abounds with evidence that they

do not. The record conclusively shows that the business of carriage by truck for hire, whether in private or in common carriage, is highly competitive. This, in fact, seems the chief complaint. The provisions of Section 6aa for the regulation of *minimum* rates offer irrefutable evidence that the regulations imposed by the Texas statute do not spring from the necessity of protecting the public from monopolistic control. Nor can it be thought that this wholly arbitrary rate-fixing scheme is required or in any way calculated to protect private carriers who are whole-heartedly opposed to such regulation. Compare *Adkins* v. *Children's Hospital,* 261 U. S. 525.

There is, furthermore, one important consideration which prevents the acquisition of monopolistic control in truck transportation. That is the ease with which the shipper may acquire and operate a privately owned truck. For this reason, the shipper of moderate size, such as the Peden Company, is not dependent upon the private carrier, or any other type of transportation by truck or otherwise. This is borne out by recent statistics of the Bureau of Public Roads which indicate that 85.8% of all trucks throughout the country are privately owned and operated, while only 14.2% operate for hire. (See The Problem of Motor Vehicle Regulation with Special Attention to the Movement of Highway Traffic Across State Lines, reported by H. H. Kelly, Division of Highway Transport, Bureau of Public Roads, U. S. Department of Agriculture, p. 11.)

The analogy to the controlling influence of electrical refrigeration plants adverted to in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, is striking. But the similarity between that and the present case does not end there. The *Liebmann* case, the latest decision of this Court in which the issue of "publicness" is involved, is based upon economic considerations substantially the same as those presented by the record now before the Court. If any prece-

dent is necessary beyond the direct authority of *Smith* v. *Cahoon*, the *Liebmann* case conclusively demonstrates that the business of private carriage of this intervener is not "affected with a public interest."

In the *Liebmann* case, the statute in question required a license as a condition precedent to engaging in the business of manufacture, sale and distribution of ice. (Oklahoma Laws 1925, c. 147, sec. 3.) By the terms of the statute, the licenses were to be granted or withheld upon consideration of the adequacy of existing facilities substantially similar to the permit requirements of Section 6 of the Texas act—considerations which customarily attach to certificates of public convenience and necessity. There were also provisions in the statute for the regulation of rates. (Oklahoma Laws, 1925, c. 147, sec. 5.) The appellee Liebmann was not actually engaged in manufacturing ice, but had purchased land and commenced erection of a plant for that purpose when a licensed manufacturer sought to enjoin him from engaging in the business without first obtaining a license. No distinction relevant to the constitutional issue involved exists between the procedure in the *Liebmann* case and in the present case, which arises upon appeal from the denial of an injunction restraining the enforcement of the Texas law sought by those whose businesses are threatened with regulation under the terms of that law.

The injunction sought in the *Liebmann* case was denied by the District Court (42 F. (2d) 918) and this decision was affirmed by the Circuit Court of Appeals (52 F. (2d) 349) where Circuit Judge Phillips said (p. 355):

> "It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the business, we seriously doubt that the manufacture of

ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory."

This Court, upon appeal, affirmed the decision of the Circuit Court of Appeals. The words of Mr. Justice Sutherland in the opinion in that case apply with equal force to the facts presented by the record in this case. He said (285 U. S. 262, 279):

"The control here asserted does not protect against monopoly, but tends to foster it. *The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.* . . . The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary."

The rate fixing and permit provisions of the Texas act fall squarely within the *ratio decidendi* of the *Liebmann* decision. The sole aim of those provisions is to foster and protect the monopoly of common carriers in the field of transportation by the exclusion of persons from engaging in the business of private carriage which has heretofore consistently been held by this court to be a purely private enterprise, and by the imposition of rate restrictions upon those who are permitted to engage in such business the sole design and effect of which are to obstruct the working of normal economic laws.

Turning from these controlling decisions to a consideration of the arguments upon which is predicated the attempt to sustain the regulation of the business of this intervener, and circumvent these decisions, passing note may be made

of the "Declaration of Policy" found in Section 22b. It is there declared that "the business of operating as a motor carrier of property for hire . . . is declared to be a business affected with the public interest." An examination of the reasons given discloses that most of them deal with traffic conditions upon the highways. As has been said, so far as the provisions of this statute are primarily and reasonably designed to remedy such conditions no complaint is made. If that be the basis for clothing intervener with the public interest, everyone who operates a motor vehicle for any purpose upon the highways is equally so clothed. No magic exists in such a legislative declaration; no such expression can, *ex proprio vigore*, conclude the question of constitutionality. *Tyson* v. *Banton*, 273 U. S. 418, 431. In so far as it is sought to strip the intervener's business of the protections of the Fourteenth Amendment by reason of this legislative pronouncement, it adds no weight to the other arguments advanced in an attempt to reach that result.

The very enactment of the statutes condemned in *Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. 570, in *Frost* v. *Railroad Comm.*, 271 U. S. 583, in *Smith* v. *Cahoon*, 283 U. S. 553, and in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, implied declarations that the legislatures enacting the statutes in controversy considered the businesses regulated were "affected with a public interest." The express legislative declaration in the present case can have no greater effect. The language of Chief Justice Taft in *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 552, is conclusive (pp. 536, 539):

> "It is manifest that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one

in which the public has come to have an interest are a subject of judicial inquiry.

* * * * * * * * *

"If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights Cases, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

The position of the lower court and the contention of the the appellees is primarily based upon certain affidavits in the record which, it is said, "show an enormous increase of so-called private carriers for hire, with a shrinking and dwindling away of common carriers"; that, as a result, "the continuance of this condition will be the disappearance altogether of the common carrier from the roads," and that the common carrier is exposed "to unrestricted, unlimited, irregular, and destructive competition from carriers private in name, but public in fact, who unregulated, ply their vocation along the roads, seeking business any and every where." (53 F (2d) at 515; R. 139). It is urged that the public interest with which to clothe the business of this intervener and other truly private carriers arises from "the effect upon the established common carrier transportation services by rail and road, of the rapidly increasing use of the highways for the carriage of freight for hire by persons assuming the real or pretended status of private contract carriers, and asserting their business to be unregulable." (53 F. (2d) at 513, R. 135).

It is a manifest weakness in this position that those who

are private carriers and those who are not but assert themselves to be for the purposes of evading regulation are grouped in a single classification. It is from this heterogeneous classification that the argument proceeds. The statute is not merely for the purpose of protecting common carriers from the competition of private carriers like the intervener. It is to prevent competition by other common carriers who seek to escape the lawful control of the state. True private carriers must have their freedom of contract invaded because some common carriers falsely assert themselves to be private carriers. The state may control this private business because, although it has the power, and, as will be shown, it is the duty of its administrative officials under this very statute to make the distinction of fact between the two classes, the legislature may find it more convenient to regulate everybody in order to be sure that it reaches those whom under established constitutional limitations it may regulate.

It is plain that it is the unlawful competition of these uncertified common carriers at which the argument of economics is really directed. Its fallacy lies in the simple truth that the status of private carriage is not determined by assertion but is a question of law and fact. If there are, as is very likely, those who seek to hide common carrier enterprises behind the name of private carriage, it is a matter of administrative efficiency to find them and subject them to the civil and penal provisions of the applicable statutes. Such administrative effort is required by the statute now before the Court which in Section 6 (a) specifically provides that no permit shall be issued "unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier."

The existence of such carriers, however, should not be made the basis of imposing business regulations like these imposed by this statute upon purely private carriers, such as

this intervener, who operate under a single contract and do not hold themselves out in any manner to carry the goods of all. Otherwise stated, it is submitted that there can be no justification for this proposal to deprive the purely private enterprise of this intervener of the settled and fundamental protection of the Fourteenth Amendment because there are others, who though public carriers in fact, lay unfounded claims to the same protection.

The answer of Mr. Justice Sutherland to the same contention made in another case is conclusive. In *Frost* v. *Railroad Comm.*, 271 U. S. 583, 599-600, he said:

> "The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

Stripped of superlatives, the theory upon which it is sought to support the regulation of private carriage may be simply stated. Common carriers by motor truck are "affected with a public interest" and therefore may be subjected to business regulation, which the Texas legislature has seen fit to impose. Competition afforded by private carriers, and in larger measure by those who are private by assertion, but common in fact, tends to render the regulation of common carriers less effective than it might otherwise be. Therefore, to add to the efficacy of this regulation of common carriers, the heretofore private enterprise of

private carriers has become clothed with the public interest. Since it is so clothed, it may be subjected to the drastic regulations of the Texas statute designed to restrict or prevent private carriers from the fulfillment of pre-existing contracts and to prevent new private carriers from entering the business. It is this very same aim with which the California statute, held invalid in *Frost* v. *Railroad Comm.*, 271 U. S. 583, was enacted. As was said in that decision (p. 591):

> "Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions."

It is for these tenuous reasons that this court is asked to depart from the settled principles so recently reiterated in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. To what ultimate result such a departure might lead can hardly be conjectured. If regulation can so beget regulation, the protections of private enterprise all are threatened. The privately owned and operated truck, representing over 85% of all trucks now in operation, is a chief competitor of the common carrier. If the drastic regulations of the Texas act may constitutionally be imposed, one result will be the increase of private ownership and operation of trucks by many shippers who previously employed private carriers. The competition thus afforded the authorized common carrier is no less direct. It follows logically from the appellees' argument that the privately owned and operated truck, which certainly uses the highways for purposes of industry and therefore of gain, may be regulated for the benefit of certified common carriers. The private automobile is the chief cause for the decrease in common carrier passenger revenues. (See *Co-ordination of Motor Transportation*, 182 I. C. C. 263, 312). It therefore may also be subjected to restrictive regulation, or excluded from the highways. Competitive fluctuations in the price of gasoline make scientific

rate making for motor driven vehicles difficult. Therefore the price of gasoline can be regulated—despite *Williams* v. *Standard Oil Co.*, 278 U. S. 235, specifically holding that it can not. The manufacture, sale and distribution of gas and electricity are commonplace public utilities. The rates of the vendors of coal and wood, who compete with them, may become fit subjects of restrictive legislation merely by virtue of that competition. A multiplication of analogies is not required to demonstrate the distance to which the principle might carry.

There is one final reason for which it is apparently proposed that the business of private carriage is clothed with the public interest. The record contains a number of affidavits of manufacturers and wholesalers, principally of hardware and food. (R. 259-72.) Each of these affidavits advocates the fixing of minimum rates of contract carriers. The reason given in each is the same. Under unregulated competitive conditions such as exist in the business of private carriage, these affiants, who employ private carriers, either "real or pretended," are unable to ascertain in advance what their competitors are paying for transportation. It is urged that minimum rates should be fixed "so that some definite amount of transportation charge may be known as between competitors dealing in the same commodity." (R. 261.) This, it is said, constitutes "discrimination as between competitors" and should be remedied by fixing minimum charges. (R. 258.)

That the correction of this alleged evil of discrimination was not the aim of the rate-fixing provision of Section 6aa is clear for the reason that this condition is not rectified by those provisions. This is true because the power to fix minimum rates may not be exercised by the Commission over all private carriers, but only those who operate "in competition with common carriers."

But even were it the purpose of this section partially to

prevent this uncertainty, no extended argument is necessary to show that this would not justify so arbitrary an invasion of the field of free private contract. The prices of food and hardware cannot be regulated. *Tyson* v. *Banton,* 273 U. S. 418, 440; *New State Ice Co.* v. *Liebmann,* 285 U. S. 262. It is absurd to say that such prices may be broken down into their component parts, and the costs of such parts subjected to regulation. If the charge for transportation under private contract may be fixed, so may the price for labor (but compare *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, *Adkins* v. *Children's Hospital,* 261 U. S. 525, *Wilson* v. *New,* 243 U. S. 332). So may the price of materials (but compare *Williams* v. *Standard Oil Co.,* 278 U. S. 235, *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1). By like reasoning the minimum charges of manufacturers may be regulated, so that some wholesalers may not be discriminated against, and so on down the line to the consumer. In a word, if the price of private carriage may be fixed for these reasons, the charges in all competitive businesses may be determined by legislative mandate.

One further consideration may be mentioned. If this Court should see fit to depart from settled precedents, and to accept the appellees' theory that the business of private carriage is regulable because of its competitive effect upon common carriers, the requirements of cargo insurance would still be unjustified. If minimum rates are to be fixed on the basis of those charged by competing common carriers, compulsory cargo insurance requirements imposed upon private carriers can have no effect upon their competition with common carriers. In fact, the private carrier has less to offer, competitively, if he does not carry such insurance.

The record discloses no demand for such insurance upon the part of the shipping public. As has been pointed out above, the question of cargo insurance is one which, it has

consistently been indicated, is to be determined by private agreement between shipper and contract carrier. The theory of the appellees, if accepted, would not, it is submitted, clothe the business of this intervener with a public interest to the extent that the freedom of contract guaranteed by the Fourteenth Amendment may thus be restricted. Compare *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522.

It is, therefore, submitted that if there is here any "public interest," it is too indirect and problematical to warrant the grave deviation from the decided cases necessarily inherent in a determination that the business of this intervener is "affected with a public interest."

4. *The regulations imposed upon the business of this intervener cannot be sustained as conditions precedent to the privilege of using the highways.*

It is not clear precisely to what extent the decision of the court below is based upon the proposition that since the state may exclude private carriers from the use of the highways, it may impose as conditions upon that use the unconstitutional permit, rate and insurance requirements.

While expressing difficulty in agreeing with the majority opinion in *Frost* v. *Railroad Comm.,* 271 U. S. 583, Circuit Judge Hutcheson concedes that if the case presented here is the same as that in the *Frost* case, it is controlling and "the power of the state must be denied." (53 F. (2d) at 514; R. 137.) Yet further on in his opinion he says (53 F. (2d) at 515; R. 140).

> "We think it perfectly plain that, as he never had a right on the roads, but merely a privilege as to them, it is too much to say that, when the state undertakes to impose upon him conditions different from those characterizing him at common law, his privilege flowers

> under the Fourteenth Amendment into a right which the state may not impair."

It is submitted that in this language, the learned judge presents the identical case considered in the *Frost* decision.

Whether or not the state has the power to exclude all private carriers is not in issue. Parenthetically, it may be said that since no state has ever sought to exercise this power, its existence has never been directly sustained by judicial decision of this or any lower Court. Compare *Weaver* v. *Public Service Comm.*, 40 Wyo. 462, 278 Pac. 542. In the *Frost* case, its existence was assumed, but not determined. (271 U. S. 583, 592-93) If we likewise assume, *arguendo*, that it exists the *Frost* case is conclusive authority that the grant of the privilege of using the highways may not be conditioned upon the submission to regulations which would not be constitutional if directly imposed. As has been shown, the provisions of the Texas act complained of constitute such regulations. Constitutional power cannot thus be used to reach unconstitutional results. It is clear, therefore, that the assumed power to exclude private carriers lends no weight to the arguments in support of the statute.

The learned judge employs a similar argument in sustaining the regulation of the rates and practices of private carriers. He says (53 F. (2d) at 514; R. 138):

> "Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the State, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the State, and must submit to the regulations applicable to his franchise as to rates and practices."

In this passage, the Court apparently assumes that the business of private carriage is one affected with the public interest to the extent that permits may be required of private carriers under Section 6. This, as has been shown, is an unjustified assumption. Taking this unwarranted premise that the permit requirements are valid and bestow upon the private carrier a franchise or privilege, the Court infers that such a privilege may be granted on the condition that the private carrier submit to regulation of its rates and practices, even though the business of contract carriage is not clothed with the public interest to the extent that its rates may be validly fixed by direct legislative action. Compare *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 539. It is manifest, upon this analysis, that here again the Court falls into error in upholding as conditions requirements otherwise unconstitutional. *Frost* v. *Railroad Comm.,* 271 U. S. 583, is clearly applicable to this argument. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, in which it was held that regulation of the rates of gasoline sold by a foreign corporation could not be conditioned upon the privilege granted that corporation to do business, is also controlling.

CONCLUSIONS.

For the foregoing reasons, that the statutory provisions complained of are an unconstitutional invasion of the right of this intervener, a private carrier, to be free from interference, under the guise of regulation, with his private business and liberty of contract is

Respectfully submitted,

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